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Contracts--"Express" or "Implied"--What Need Be Shown in a Family Relationship

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Recent Cases

CONTRACTS—"EXPRESS" OR "IMPLIED"—WHAT NEED BE SHOWN IN A FAMILY RELATIONSHIP—At the age of two the plaintiff was taken into the home of Mr. and Mrs. Oxley, daughter and son-in-law of deceased, who lived with deceased, Mrs. Victor, and cared for her. The plaintiff's father lived as a tenant on a near-by farm owned by the deceased, but the plaintiff, no relation to the deceased, lived with the Oxleys the greater part of the time, establishing a "family relationship." Both Mr. and Mrs. Oxley having died by 1949, the plaintiff, now age 26, expressed his intention to leave, but was persuaded to stay on by the defendant. During this time the plaintiff cleaned house, cooked meals, and generally ran the household. The mental and physical condition of the deceased deteriorated during the time the plaintiff cared for her, and because she so requested, the plaintiff remained with her constantly. Four disinterested witnesses testified to the effect that the deceased had told them she expected the plaintiff to be well paid. Having previously been paid for all services he had rendered the deceased, the plaintiff seeks to recover for services rendered to the deceased during the last two years of her life. The lower court allowed recovery. *Held*: Reversed on an instruction which, in effect, directed the jury to find that the plaintiff's debt existed in fact. The Court said the jury should have been allowed to ascertain if the decedent owed the debt. In their discussion of the case the Court expressed the view that the plaintiff could recover upon the showing of an implied-in-fact contract, where, to overcome the presumption of gratuity arising out of the family relationship, an "express contract" need be established for services claimed. *Victor's Executor v. Monson*, 283 S.W. 2d 175 (Ky. 1955).

The Kentucky Court has continually laid down the rule that where a family relationship exists by consanguinity, and sometimes affinity,¹ a presumption is raised that the services were rendered gratuitously.² Where parties live in a close family relationship, each contributing work or money to the common cause and each receiving mutual benefit, an "express contract" must be shown to refute this presump-

¹ *Lucius' Admr. v. Owen*, 198 Ky. 114, 248 SW 495 (1923) (father-in-law, son-in-law); *Bolling v. Bolling*, 146 Ky. 363, 142 SW 387 (1912) (uncle, nephew).

² *Walker v. Dill's Admr.*, 186 Ky. 638, 218 SW 247 (1920); *Corbin's Exr's v. Corbin*, 302 Ky. 208, 194 SW 2d 65 (1946); *Combs v. Cole*, 307 Ky. 651, 212 SW 2d 113 (1943); *Sword v. Moore's Admr.*, 303 Ky. 507, 198 SW 2d 215 (1946).

tion. There will be no "implied contract" raised in favor of any person occupying such a relationship for recompense for mutual services rendered.³ Only where the services rendered are extraordinary,⁴ or non-personal in nature⁵ will the Court permit an "implied contract" to warrant recovery.

There are three types of contracts: (1) express contracts, (2) implied-in-fact contracts, and (3) implied-in-law contracts. An express contract is one in which the terms are stated by the parties. If the agreement or mutual assent is manifested in *words*, oral or written, the contract is said to be express. On the other hand, where the mutual undertaking of the parties is inferred from their *conduct* alone, without spoken or written words, the contract is said to be implied-in-fact. In either case an actual agreement is manifested. The only difference, therefore, between an express contract and an implied-in-fact contract rests in the mode of proof required to establish the mutual undertaking of the parties.⁶ It is said that there is no distinction in legal effect as to the two types of contracts; the only distinction being in the manner through which mutual assent is manifested by the parties.⁷ A contract implied in law is one in which a promise is implied by law for the purpose of affording a remedy without which injustice would result. The circumstances need not show that a promise was ever made or intended.

Since the family tie gives rise to a presumption of gratuity on the part of the one who renders the services, the fundamental question is to determine which type of contract will be sufficient to rebut this presumption. The failure of the Kentucky Court to consistently recognize the distinction among the three types of contracts in the family relationship cases and its ambiguous reference to an "express contract" in many of these cases has made it difficult to ascertain what must be shown to establish a claim for services in a family relationship situation.

The Kentucky Court as early as 1833 indicated that a son might recover from his father's estate for labor done by him upon proof of

³ *Conway v. Conway*, 130 Ky. 218, 113 SW 94 (1908); *Oliver v. Gardner*, 192 Ky. 89, 232 SW 418 (1921); *Combs v. Cole*, 307 Ky. 651, 212 SW 2d 113 (1943).

⁴ *Humble v. Humble*, 152 Ky. 160, 153 SW 249 (1913) (5 years); *Allen v. Smith*, 208 Ky. 207, 270 SW 782 (1925) (5 years); *Clark Admr. v. Hale*, 209 Ky. 496, 273 SW 39 (1925) (5 years); *Gover's Admr. v. Waddle*, 245 Ky. 652, 54 SW 2d 19 (1932). Where the services cover a long period of time, presumption that the services were rendered gratuitously is weakened by this factor.

⁵ *DeFever's Exr. v. Brooks*, 203 Ky. 606, 262 SW 976 (1924); *Cheatham's Exr. v. Parr*, 308 Ky. 183, 214 SW 2d 95 (1948); *Thompson v. Hunter's Exr.*, 269 SW 2d 266 (Ky. 1954). Those services included in the non-personal class are those exclusive of board, lodging, and nursing.

⁶ *Simpson*, *Contracts* 8 (1954).

⁷ *Williston*, *Contracts* 4 (1938).

facts from which a promise of payment may be inferred.⁸ The agreement under which the Court would have allowed recovery in that case is what should be referred to as an implied-in-fact contract, since it was not expressed in words yet the Court failed to put this label upon it. The failure of this Court to use the label "implied-in-fact-contract" for this particular type of agreement has led the Court in subsequent cases to refer to these agreements as "express contracts".⁹ This dual use of the term "express contract" has created ambiguity as to what proof will be sufficient to warrant recovery for services rendered in a family relationship, and has even led some commentators to misunderstand its intended meaning in the Kentucky decisions.¹⁰ The term "implied-in-fact" should be used where applicable, so that it will be clear that recovery can be had not only where the parties have expressed themselves in words, but also by conduct.¹¹

The Court's failure to recognize the essential nature of the "express contract" also leads to ambiguity in their reference to an "implied contract", since there are two types of implied contracts, those implied in fact and those implied in law. If the Court would use the term "implied-in-fact" contract when applying their "express contract" theory of recovery, there could be no doubt that the Court meant a contract implied-in-law when they say no contract will be "implied" in favor of any sustaining a family relationship. The need for care in differentiating these two types of "implied" contracts becomes evident in considering cases in which the Court, although recognizing the "express contract" rule in the family relationship cases, tended to permit recovery on an "implied contract" where the services were extraordinary¹² or non-personal in their nature.¹³ Just what the Court has

⁸ Engleman's Executor v. Engleman, 31 Ky. 437 (1 Dana 1833).

⁹ Ballard v. Ballard, 177 Ky. 253, 197 SW 661 (1917); Green's Admr. v. Smith, 234 Ky. 448, 28 SW 2d 494 (1930); Vanover v. Vanover, 252 Ky. 308, 67 SW 2d 21 (1934); Flynn's Exr. v. Mullett, 254 Ky. 90, 70 SW 2d 978 (1934). And in the principal case the Court lays down the standard rule that there will be no recovery without the showing of an "express contract". This case goes further, however, to use the label implied in fact contract and thereby recognizes the essential nature of their use of the term "express contract".

¹⁰ 7 A.L.R. 2d, (1949). Herein are listed various Kentucky cases which supposedly stand for the proposition that an express contract, that is, one expressed by words, must be shown before recovery can be had in a family relationship. It is believed by the writer that these cases are in line with other Kentucky cases and that the term "express contract" used by the Court means expressed by words or by conduct of the parties.

¹¹ It is the writer's opinion that the use of the term "express contract" as meaning an agreement given rise to by the words of the parties or an agreement to be inferred from the facts and circumstances surrounding the parties has not become such a universal concept as to warrant its use with this dual meaning. See Kellum v. Browning's Admr., 231 Ky. 308, 21 SW 2d 459 (1929).

¹² Supra, note 4.

¹³ Supra, note 5.

meant by "implied contract" is not clear. This is undoubtedly the end result of the Court's failing to use the term "implied-in-fact" contract in designating its basis for recovery under their "express contract" rule.

In the principal case the Court picked up the term "implied-in-fact" contract in saying:

If the proven facts and circumstances are such as to fairly show . . . (a contract) . . . the court or the jury trying the case will be authorized to find an express contract . . . this particular type agreement is denominated a contract implied in fact . . . from what has been shown it is apparent a form of express contract has been established, i.e., a contract implied in fact.¹⁴

In applying this analysis of an express contract¹⁵ the Court expressed the view that the plaintiff was entitled to recover with proof of an implied-in-fact contract because "implied in fact contract is actually a species of an express contract."¹⁶ This phraseology, if adhered to, would aid in dispelling the cloud which has existed in previous cases.¹⁷ The Court's use of the term "express contract" as a valid basis for recovery is now known to include an implied-in-fact contract. The language used here also gives understanding to the term "implied contract" under which the Court would not allow recovery in the past. By making the implied-in-fact contract a valid basis for recovery under the "express contract" rule, it leaves only the contract implied in law within the category of "implied contract", whereas, before the label was used, it was not known whether "implied contract" meant implied in fact or implied in law.

¹⁴ *Victor's Executor v. Monson*, 283 SW 2d 175, 176-178 (Ky. 1955).

¹⁵ The language used by the Court to point out the relationship of an express contract and an implied in fact contract was used in showing that an express contract could be pleaded, and if an implied in fact contract be shown by the proof it would be allowed to stand because an implied in fact contract is a species of express contract. It is to be noted here that the Court, in explaining this relationship in order to overcome the supposed variance, used the method of ordinary contracts by saying it should be "fairly shown". The views of the courts in prior cases dealing with the family relationship problem have been to the effect that something more, i.e., "strong and convincing evidence" needs to be shown than in the ordinary contract situation. This "something more" is required in view of the presumption of gratuity growing out of the family relationship. *Gayheart's Admr. v. Gayheart*, 287 Ky. 720, 155 SW 2d 1 (1941); *Carpenter v. Carpenter*, 299 Ky. 738, 187 SW 2d 282 (1945); *West v. West*, 312 Ky. 788, 229 SW 2d 451 (1950).

¹⁶ It must be kept in mind that the narrow holding in the principal case was that the lower court wrongfully instructed the jury. The view expressed by the court here as to the relationship of the two types of contracts is, at best, dicta.

¹⁷ In *Montgomery v. Smith*, 288 SW 2d 623 (Ky. 1956), the most recent case on this subject, the Kentucky Court went back to the use of the term "express contract" without pointing out that it embodied an implied in fact contract. This, concededly, is a mere play on words, but the writer believes, as pointed out in footnote 11, *supra*, that the term implied-in-fact contract should be used to avoid possible misunderstanding.

Conclusion

Kentucky law, with the "expressions" in the principal case, has been clarified and made consistent with the majority view¹⁸ as expressed by the Courts in other states.¹⁹ It can now be said that one can rebut the presumption of gratuity growing out of the family relationship upon proof of either an express contract or an implied-in-fact contract. The contract implied in law will not be allowed to rebut the presumption of gratuity in such a situation unless the services are extraordinary or non-personal in their nature.

Henry H. Dickinson

CREDITORS RIGHTS—ATTACHMENT LIEN CREATED ONLY FROM TIME OF ACTUAL LEVY.—Pursuant to a creditor's suit, a summons and a general order of attachment against the defendant's property were issued and delivered to the constable for service and execution. Acting under this authority, he attempted to attach the defendant's automobile by merely handing him a copy of the summons and announcing that he was attaching the car. It appears that the car was present, but that he neither placed the writ upon it nor did any other overt act with respect to it after the defendant objected to the attachment with some vigor. Subsequently, the defendant drove the car daily for about three months to and from his job which was located in another state, until on one such trip the car was destroyed by fire while in that state. The defendant appealed from a conviction of the crime of having fraudulently and knowingly removed from Kentucky personal property subject to a lien with intent to prevent its enforcement.¹

HELD: Reversed with directions to set aside. Existence of a lien on the property when it is removed from the state is an essential element of the crime. The Court held that the general statutory rule is that an

¹⁸ Kentucky has always been in accord through its application of their "express contract", but the language as well as the application now tends to show recovery can be had with either an express contract or a contract implied in fact.

¹⁹ 7 A.L.R. 2d 23 (1949). Also see 58 Am. Jur. 523 (1948), footnote 16 and cases cited therein.

¹ Ky. Rev. Stat. sec. 434.210 which creates this offense provides that:

If any person shall fraudulently conceal, dispose of or knowingly remove from this state any personal property on which there is at the time a duly executed and acknowledged mortgage whether the same be of record at said time or not, or any lien given under the statutory laws of the Commonwealth of Kentucky, with intent to prevent or hinder the enforcement of the lien . . . , he shall be guilty of the larceny of the property, . . .

Hereinafter Ky. Rev. Stat. will be referred to as "KRS".